

Adverse Representations

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Reprinted from *Minnesota Lawyer* (June 21, 1999)

A lawyer acts as a Good Samaritan for two injured people. Indeed, lawyers should act as Good Samaritans. However, when personal conduct becomes professional representation, the Rules of Professional Conduct apply, and lawyers must proceed within those rules.

In a recent case, the lawyer happened upon the scene of a one-car accident. The car was driven by AA, and the passenger was BB. Beginning at the scene of the accident, the lawyer represented AA regarding potential driving while intoxicated or criminal vehicular operation charges arising out of the accident. AA paid the lawyer \$350 for these services. Ultimately, no criminal charges were filed against AA. The lawyer's representation of AA ended about three weeks after the accident. Thereafter, BB retained the lawyer to represent BB in a personal injury action against AA to recover damages for injuries BB suffered in the accident.

The lawyer's representation of BB violated Rule 1.9(a), MRPC, which provides:

"A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

The potential criminal charges against AA and the personal injury action between BB and AA arose out of the same matter, the one-car automobile accident.

During the disciplinary investigation, the lawyer acknowledged that this matter presented a close call but claimed that there was no material adversity between BB and AA. According to the lawyer, BB's suit against AA really was a action to get to the insurance policies that may cover the accident. The named defendant, however, was the lawyer's former client, AA. AA's alleged negligence would be a focus of BB's claim. The lawyer's complaint sought more than \$50,000 in damages for BB from AA, and the claim may have exceeded applicable policy limits.

Not only did the lawyer acknowledge the matter presented a close call, the lawyer himself best summarized the conflict. In a letter to BB after the lawyer commenced BB's suit against AA, the lawyer stated (names and identifying information have been changed or deleted):

"At this point, the opposing attorney states that AA is prepared to waive all claims to a conflict of interest, but only upon your [BB's] agreement that any claims to be pursued for your personal injuries will not be directed personally against AA or his assets. In other words, if we agreed that your claim is for recovery of insurance proceeds only (and not for recovery out of personal funds, accounts or property of AA), AA and his attorney will waive any and all claims regarding the conflict of interest.

My clear recollection is that we talked about this long ago, and that you agreed you were not seeking to

recover any amount from AA's personal funds or property. If I am correct about this, please date and sign below, and return this letter to me at your earliest convenience. I will then confirm our intentions in a letter to the opposing attorney, and we will be moving ahead with our work on your behalf.

I am also recommending that you authorize a demand for payment of the policy limits at this time. We feel that your personal injuries clearly warrant a recovery in excess of the \$30,000 limit on AA's policy, and suggest that you authorize making a demand for this insurance amount in partial settlement of your personal injury."

On the one hand, the lawyer urges BB to refrain from a claim against AA personally. On the other hand, a lawyer tells BB that he has a strong claim for damages in excess of policy limits. This reveals the conflict and its potential impact. For undertaking the representation of BB, the lawyer received an admonition.